IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 140 of 2006

JAI KISHAN & ORS
V/S
CHAND MAL & ANR

Mr. PR MEHTA, for the appellant / petitioner

Mr. MD BOOB, for the respondent

Date of Order : 29.8.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

Heard learned counsel for the parties.

The learned lower appellate court has decreed the plaintiffs' suit, reversing the finding of the learned trial court on issue Nos. 1, 2 and 3.

The facts of the case are, that the plaintiffs filed a suit for declaration and injunction, alleging inter alia, that the property described in para 1 of the plaint was purchased by five brothers, from Achal Singh by registered sale deed. Out of five brothers, Hapuram expired and therefore, his share remained with the other four brothers. Out of them, Chaturbhuj, Premraj and Tulsiram expired, the defendant Nos. 1, 2 and 3 are heirs of the Tulsiram and the defendant No.4 himself is one of the purchasers. It was then alleged that the property was orally partitioned between the four, i.e. Chaturbhuj,

Premraj, Lumb Chand & Tulsi Ram, and the already existing staircase was kept joint, and was used by all, for going to each one's portion. It is then alleged that the plaintiffs have purchased the share of Chaturbhuj from his heir Mulidevi, on 16.2.73 by registered sale deed. It is also alleged that as the staircase was kept joint, the property was divided after excluding the measurement of the portion of staircase. Inter alia, with these averments, it is alleged that shortly before filing of the suit, the gate from which the stair case was being used, has been closed. Therefore, it was prayed that the gate be got opened by removing the obstacles and the stair case be declared joint.

The defendant Nos. 1 to 3 and the defendant No.4 filed separate written statements. The defendant Nos. 1 to 3 contended, that the stair case is in the possession and ownership of the defendants, but the plaintiffs – defendants had been jointly using it since before partition. However, it is wrong that the plaintiff used to go to his apartment situated on the first floor through the apartment of the Tulsiram. It was also pleaded, that the plaintiffs have got made wrong recital in the sale deed from Mulidevi. However, that sale deed bears the signature of their ancestral Tulsiram. It was also pleaded, that the plaintiffs have their independent passages and stair case. The defendant No.4 took the stand, that apart from five brothers, there are two more brothers, being, Lunaram and

Baluram, who also, as the heirs of Hapuram, have their shares. However, the defendant No.4 purchased 1/6th share out of the share of Hapuram, and also purchased the share of Lunaram and Baluram. According to this defendant, there is no common stair case, and everyone has erected a close wall, and only walls are joint, otherwise everyone has one's own stair case. It was then pleaded, that since the share of Hapuram was purchased by Baluram and Lunaram, therefore, only stair case was left in the share of Hapuram, with the stipulation, that so long as other co-sharers do not construct their independent stair case, they will use the stair case jointly, and accordingly it was prayed that the suit is liable to be dismissed.

A rejoinder has also been filed.

The learned trial court dismissed the suit, inter alia finding, that even according to the plaintiff, after the death of Hapuram, the property was divided in four brothers orally. It was also found, that Chaturbhuj had died before the partition, and that the partition took place before 1973. Then on the precise question, as to whether the stair case was kept joint in the partition or not, it was found, that the only alive person of the partition was defendant Lumbaram, and in the sale deed Ex.3-A, all that is mentioned is, that there is only one stair case to go upstairs, and which is being used by all the co-sharers. But it is not mentioned, that the stair

case is of joint ownership, and that, even according to the plaintiff, the stair case was being commonly used, and it is not plaintiffs' case, that it is in joint ownership. Then referring to the other parts of statements of some of the witnesses, it was found, that the plaintiffs have failed to prove, that the defendant Nos. 1 to 3, did not get full ownership rights on the property, which fell in their share, or that the plaintiff retained any right of passage through that property. Thus, it was found that the plaintiff has failed to prove the stair case to be joint. Inter alia, with these findings, the suit was dismissed.

In appeal, the learned appellate court has reversed the findings. While deciding Issue No.1, it has been held, that according to the defendant Nos. 1 to 3, when plaintiffs purchased the share of Mulidevi, there was only one stair case, and that after purchase from Mulidevi, the plaintiff has constructed separate stair case. According to the defendants, the stair case was in their ownership and possession since beginning, and the plaintiffs were only using it. In absence of anything on the side of the defendants to show, as to how the plaintiffs were using their property situated on the first floor, before construction of their staircase, the obvious result is, that as a co-sharer, everyone was using this stair case. Thus, it was considered that since at the time of the partition, there was only one stair case, and all the co-sharers were using it, therefore, the stair case was

found to be joint property. While deciding issue Nos. 2 and 3, it was considered, that case of the defendant No.4 is, that he purchased a share of Hapuram, so much so that while in witness box, he has laid claim to the said stair case by virtue of his having purchased it from Hapuram, while no document of such purchase has been placed on record. Apart from the fact that the stair case, which, while deciding issue No.1, has been found to be joint property, could not be sold, and since there is nothing to show, that after partition, the right of the other co-sharers, in the stair case, were relinquished, for any consideration or otherwise, coupled with the fact, that in the sale deed Ex.3-A, the stair case is recited to be joint, and that sale deed bears the signature of the defendant No.4 Lumbaram, as attesting witness, it is clear, that the stair case is joint.

I have heard learned counsels, in my view, when admittedly, before sale deed of 1973, there was only one stair case in the property, obviously since the co-sharers were having apartment on the first floor, the rights of the of the co-purchasers in the stair case are rightly to be computed as joint. In that view of the matter, when the defendant Nos. 1, 2 and 3 have not disputed the averments of para 1 to 4 of the plaint, and in absence of any legal material to show, as to how the rights of the other co-sharers in the stair case were extinguished, after partition, and in accordance with law, and came to be

exclusively vested in the appellants, it cannot be said, that the findings of the learned lower courts require any interference by this Court in the second appeal. Much was sought to be contended, on the basis, that since Lumbaram was only attesting witness in the sale deed, he cannot be said to be bound by the recital in the sale deed, and in any case, the other rights of the other defendants could not be adversely affected by those recitals. Of course, there are contradictory versions of Lumbaram, while in the witness box, on the question, as to whether he had read contents of the sale deed Ex.3-A, however, the fact remains, that even de hors the document, the learned lower appellate court has considered the entire material on record, and has found at page 11, that in absence of any legal material on record, to show, that the rights of the plaintiffs in stair case were relinquished for any consideration, or otherwise, the rights of the plaintiffs which were joint in the stair case, do continue. The sale deed has only been taken in evidence as corroborative piece of evidence. In my view even from other attending circumstances, and evidence of the parties, it is clear that stair case is joint.

In that view of the matter, I do not find any force in the appeal and the same, therefore, is dismissed summarily.

(N P GUPTA),J.

/Anil/